

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LARRY F. MADSEN, DDS,

No. C 08-3379 CRB

Plaintiff,

**ORDER DENYING MOTION FOR
SUMMARY JUDGMENT**

v.

OHIO NATIONAL LIFE ASSURANCE
CORPORATION,

Defendant.

Now pending before the Court is defendant's motion for summary judgment. After carefully considering the papers filed by the parties, the Court concludes that oral argument is unnecessary, see Civil Local Rule 7-1(b), and DENIES the motion for summary judgment.

There is a genuine dispute as to whether plaintiff was unable to perform the substantial and material duties of his own occupation in the usual and customary way with reasonable continuity. See Hangarter v. Provident Life and Accident Ins. Co., 373 F.3d 998, 1006 (9th Cir. 2004). There is also a genuine dispute as to whether defendant's denial of coverage was unreasonable or without proper cause; accordingly, summary judgment on the tort claim is also denied.

The Court will decide whether to allow the jury to decide the issue of punitive

1 damages after hearing all the evidence at trial. If the question goes to the jury, and the jury
2 decides that punitive damages are warranted, the amount of such damages will be decided in
3 a second phase of trial.

4 The parties should appear at 8:30 a.m. on May 1, 2009 for the further case
5 management conference.

6 **IT IS SO ORDERED.**

7 Dated: April 27, 2009

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10 CHARLES R. BREYER
11 UNITED STATES DISTRICT JUDGE
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